



**TC04903**

**Appeal number: TC/2014/4477**

***CAPITAL GAINS TAX – refusal of Entrepreneurs’ Relief – Whether individual an officer or employee throughout the period of one year ending with the date of disposal – no – appeal dismissed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JOHN KENNETH MOORE**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE AMANDA BROWN  
CHARLES BAKER**

**Sitting in public at Royal Courts of Justice, The Strand, London, WC2A 2LL on  
19 February 2016**

**Mr B Ahmad, accountant of Mehta & Co for the Appellant**

**Mr D Linneker, presenting officer of HM Revenue and Customs, for the  
Respondents**

## DECISION

1. This is an appeal against a notice of assessment issued on 1 April 2014 under  
5 section 29 Taxes Management Act 1970 in an amount of £37,384 for the year ended 5  
April 2010. The assessment was raised as a consequence of HM Revenue & Customs  
("the Respondent") concluding that the claim made by Mr John Kenneth Moore ("the  
Appellant") on his self-assessment tax return in respect of Entrepreneurs' Relief on a  
capital gain on a disposal of shares in Alpha Micro Components Limited ("Alpha")  
10 did not qualify for relief.

### **Background**

2. Alpha was established in 1995 and is in business distributing electronic  
components. The Appellant was one of the founding shareholders and directors.  
Prior to 2009, he held 3000 of the 10000 issued £1 shares, held the office of Sales and  
15 Marketing Director and was employed under a contract of employment.

3. During the course of 2008, the direction of Alpha became the matter of a  
dispute between the Appellant and the other shareholder directors and it was agreed  
that the Appellant would leave the business.

4. In approximately November 2008 Alpha appointed Mr D Mehta of Mehta & Co  
20 to mediate a settlement between the Appellant and Alpha on an amicable basis.  
Through the period to late January/early February Mr Mehta met or spoke with the  
Appellant and separately with the other directors in order to identify a compromise  
acceptable to all parties.

5. On 29 January 2009, one of the Alpha directors instructed solicitors to draft the  
25 necessary contractual documentation for settlement based on terms agreed through the  
mediation/negotiation process conducted by Mr Mehta. These terms were set out in  
an unsigned and undated document supplied by Mehta & Co to the solicitors under  
cover of an email dated 17 February 2009.

6. In summary, the terms were agreed such that Alpha would purchase 2700 of the  
30 Appellant's 3000 shares; the remaining 300 shares would be converted to non-voting  
shares and clearance would be sought from the respondent that Alpha's acquisition of  
the shares would be treated as a capital transaction.

7. It was also agreed, but not recorded in the heads of terms, that the Appellant's  
35 employment would be terminated, that he would receive an ex gratia payment and that  
he would resign as a director.

8. On 29 May 2009, there was a general meeting of the company. At that meeting,  
which the Appellant attended, it was resolved that Alpha would purchase 2700 shares  
from the Appellant. It was further resolved to take additional borrowing.

9. On the same day, the Appellant signed a Compromise Agreement for the termination of his employment and the Agreement for Purchase of Own Shares. All Companies House papers concerning the Appellant's resignation as a director were also signed on that day. However, such documents state the effective date of his resignation as a director was 28 February 2009.

10. By his self-assessment tax return to 5 April 2010 the Appellant declared the share sale for capital gains tax purposes claiming Entrepreneurs' Relief pursuant to section 169M Taxation of Chargeable Gains Act 1992 ("TCGA").

11. The Respondents opened an enquiry into the return and concluded that the Appellant was not entitled to claim Entrepreneurs' Relief because the statutory conditions set out in section 169I(6)(b) TCGA had not been met. Specifically, he was not, throughout the period of one year ending with the disposal of his shareholding, either an officer or employee of Alpha.

12. On 1 April 2014, the Respondent issued an assessment to recover the amount of Entrepreneurs' Relief claimed.

### **The appeal**

13. By its notice of appeal, the Appellant claimed "Mr Moore disposed of his shares in Alpha Micro Components Limited on 29 May 2009. On that day he also resigned as a director as evidenced by the signing of various documents at a meeting attended by all directors and shareholders. The incumbent directors have also given written confirmation that he remained a director until that date. He was therefore entitled to Entrepreneurs' Relief in the amount of £37,384".

14. It is apparent from those grounds that the basis of the appeal was that the shares were disposed of on 29 May 2009 and that the Appellant was an office holder until the date of disposal.

15. However, before the Tribunal the Appellant advanced a completely different case. By the time of the hearing, the Appellant accepted that he had ceased employment and was no longer an office holder of Alpha from 28 February 2009.

16. Before the Tribunal it was contended that the disposal of the shares giving rise to the capital gain was in fact "some time in February 2009" when negotiations were complete between the parties. This follows from section 28 TCGA 1992, which provides that the date of disposal is the date of the contract for sale. It was contended that the completion of the negotiations resulted in a binding contract for sale in February 2009.

17. The Respondent, in response to this argument contended that there was no binding agreement to dispose and therefore no disposal of the shares until 29 May 2009. The Respondents contended that there was no evidence of an agreement (absent a signed agreement to that effect) and if there was an oral agreement it must have been conditional on the Respondents' clearance for the company's purchase of

its own shares and upon confirmation of additional funding for the purchase of the shares.

### Relevant legislation

18. The statutory provisions concerning Entrepreneurs' Relief are contained in part 5 TCGA. Section 169H provides for a lower rate of capital gains tax to apply to a material disposal of business assets as defined in section 169I. There is no dispute between the parties that save for the condition in Section 169I(6)(b) all the conditions for a material disposal are otherwise met. Section 169I(6)(b) however provides that "throughout the period of 1 year *ending with the date of disposal* ... the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group" (emphasis added).

19. Section 28 TCGA provides:

(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).

(2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied.

20. Also relevant to the appeal are the provisions of sections 693 and 694 Companies Act 2006, which governs the purchase by a company of its own shares other than on a recognised stock exchange. The first two sub-sections of s694 which apply to a company's own purchase of shares pursuant to s693(1) read:

(1) A company may only make an off-market purchase of its own shares in pursuance of a contract approved prior to the purchase in accordance with this section.

(2) Either—

(a) the terms of the contract must be authorised by a special resolution of the company before the contract is entered into, or

(b) the contract must provide that no shares may be purchased in pursuance of the contract until its terms have been authorised by a special resolution of the company.

21. Although we drew the attention of the parties to this provision, neither made any representations.

## Evidence

22. The Tribunal heard evidence from Mr Moore and Mr Mehta and examined a bundle of documents.

23. As it transpired in the hearing, there was only one matter in dispute and that matter is one of mixed fact and law: was there an unconditional contract for disposal of the shares by 28 February 2009?

24. In the Tribunal's view, the matter ultimately turned on a simple matter of law. Explicit findings of fact therefore became unnecessary. However, for completeness that Tribunal finds:

- 10 (1) The Appellant ceased to be a director on 28 February 2009.
- (2) His formal employment ceased on 28 February 2009.
- (3) The broad terms of the settlement between the parties including the purchase price for the shares were agreed during February 2009.
- 15 (4) The heads of terms represented the final point of discussion of the terms of settlement.
- (5) Subsequent to agreement of the terms of settlement Alpha obtained clearance from the Respondent pursuant to s225 Taxes Act 1988 but as that provision is not a mandatory requirement it is unlikely that it represented a condition to any contract for disposal.
- 20 (6) Alpha did have sufficient cash reserves to make the payment to the Appellant for the shares without securing additional funding as approved on 29 May 2009. However, the stated reason for the difference of opinion between the Appellant and Alpha was the direction of the business and the associated capital investment required. Absent evidence from Alpha, the Tribunal therefore considers that it is likely that Alpha did consider it necessary that it
- 25 secure additional funding prior to making the purchase in order to ensure that it retained sufficient working capital to maintain its intended direction.
- (7) In the period commencing with a letter from Mehta & Co, dated 17 February 2009 and concluding on 31 March 2009, Alpha sought, and was
- 30 granted by the Respondent, clearance pursuant to section 225(1) Taxes Act 1988 that the payment made for the shares would be treated as a capital payment pursuant to section 219(1) Taxes Act 1988
- (8) The Appellant accepts that he resigned as a director and ceased his
- 35 employment on 28 February 2009. The Appellant was paid his salary and all due accrued holiday entitlement up to 28 February 2009. The Appellant said that at that time he established a service company JM Technology Solutions Limited and began providing services to Alpha through that company managing and developing client relationships in the Manchester - Leeds corridor. In fact, the Companies House record shows that JM Technology Solutions Limited was
- 40 incorporated on 23 March 2009 and the Appellant was appointed as a director with effect from that date.

(9) Consistent with the Appellant having ceased as a director of Alpha the Companies House annual return made up to 6 April 2009 confirmed that the Appellant was no longer a director as at that date. The Appellant was identified on the return as continuing to hold 3000 shares.

5 (10) The company's Annual Return and all statutory documents, along with the Appellant's own self-assessment tax returns for both 2009 and 2010 are all consistent with the contract for disposal not having been concluded by 28 February 2009 or any date before 29 May 2009.

## 10 **Decision**

25. The Tribunal gave its decision at the end of the hearing.

15 26. It is clear on the evidence (and accepted by him) that the Appellant resigned as a director with effect from 28 February 2009. His employment terminated with effect from that date though he continued to serve the company under a contract for services between a personal services company and Alpha. He did not seek to contend that such services were capable of amounting to employment for the purposes of section 169I TCGA.

27. Therefore, in order to succeed the Appellant had to show that the disposal of shares took place no later than 28 February 2009.

20 28. Section 28 TCGA provides that the time of disposal is determined by reference to when the unconditional contract for disposal is made. Sections 693 and 694 Companies Act 2006 require any contract for a company's own purchase of shares be approved in advance by a special resolution. In the present case, that resolution was not passed until 29 May 2009. Accordingly, the company was simply incapable of  
25 entering into a valid contract to purchase the shares until that resolution had been passed. Irrespective of the terms that may have been agreed between the directors some point during February, the company lacked the authority for that agreement to constitute a contract for purchase. Alternatively if there had been a contract (which the Tribunal doubts), that had to be conditional on approval by special resolution. In  
30 accordance with section 28(2) TCGA the date of disposal under a conditional contract is the date on which the condition was satisfied, namely 29 May 2009.

29. The Appellant ceased to be a director or employee on 28 February 2009. Consequently, he was not a director or employee throughout the year leading up to the disposal of his shares on 29 May 2009. The Appellant did not meet that statutory  
35 condition for Entrepreneurs Relief. For this reason, the appeal is dismissed.

30. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later  
40 than 56 days after this decision is sent to that party. The parties are referred to

“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”  
which accompanies and forms part of this decision notice.

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**AMANDA BROWN  
TRIBUNAL JUDGE**

**RELEASE DATE: 22 FEBRUARY 2016**

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